

48A C.J.S. Judges § 363

Corpus Juris Secundum | August 2023 Update

Judges

Joseph Bassano, J.D.; Khara Singer-Mack, J.D.; Thomas Muskus, J.D.; Karl Oakes, J.D. and Jeffrey J. Shampo, J.D.

X. Special or Substitute Judges and Like Judicial Officers


B. Selection and Appointment of Special or Substitute Judges

2. Selection and Appointment Procedures of Special or Substitute Judges

§ 363. Objections to selection of special or substitute judge and waiver thereof

[Topic Summary](#) | [References](#) | [Correlation Table](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  16(.5), 19

Objections to the selection of a special or substitute judge may be made, but such objections may be waived by act or omission of the party.

The parties to a judicial proceeding may raise objections to the manner of selection of a special or substitute judge.¹ Such objections must be based on substantial reason² and be timely made.³

If such objections are promptly made, the validity of the appointment of the special judge must be decided.⁴ The party who challenges the selection of a special or substitute judge has the burden of showing that the regular judge is able to hold court.⁵ In the absence of a statute to the contrary,⁶ the court is not bound by any objections and may in the exercise of sound discretion disregard them.⁷

Where there is no claim that a fundamental principle of justice has been violated, the appropriateness of the appointment of a magistrate to hear a case becomes a question of compliance with state law.⁸

Because a special judge is a person who serves as a judge in a particular case but who is not otherwise a judge, a quo warranto proceeding is not the only means to contest the appointment of a special judge.⁹

A special judge election is impervious to attack unless the facts that would defeat the election are recited in the record.¹⁰

Waiver of objections.

Failure to timely and properly raise any objection to appointment of an acting judge is a waiver of such objection¹¹ unless the judge's actions are void.¹² A party accepts the appointment of a special judge, submits to jurisdiction, and waives any irregularity in the appointment of a special judge where the party does not object to said irregularity.¹³ Such rule is also applicable in criminal cases.¹⁴ Accordingly, a defendant voluntarily consented to a special judge's authority and thereby waived any irregularity in the appointment of the special judge where the defendant and his counsel both stated that they did not object when asked on the record whether the defendant had any objection in light of the irregularity.¹⁵ A defendant's knowing failure to object to the substitution of trial judges is the equivalent of consent and, when consent to substitution is given, there is no necessity to show that the absence of the trial judge was due to a termination of office, absence, death, sickness, or other disability.¹⁶

The appointment of an acting judge is not subject to collateral attack if a defendant has failed to file a timely objection to the appointment,¹⁷ and a conviction will not be set aside, on the grounds that the special judge presiding over the case was not validly elected, when the defendant fails to contest the validity of the election at trial.¹⁸

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Footnotes

- 1 Ark.—Titan Oil & Gas, Inc. v. Shipley, 257 Ark. 278, 517 S.W.2d 210 (1974).
Ind.—Pruitt v. State, 269 Ind. 559, 382 N.E.2d 150 (1978).
As to objections to authority of special or temporary judge, see § 374.
- 2 Ariz.—Hagan v. Kornegay, 35 Ariz. 164, 275 P. 8 (1929).
- 3 Ind.—Pruitt v. State, 269 Ind. 559, 382 N.E.2d 150 (1978).
- 4 Ky.—Goodloe's Ex'r v. Goodloe, 208 Ky. 189, 270 S.W. 790 (1925).
- 5 Ark.—Titan Oil & Gas, Inc. v. Shipley, 257 Ark. 278, 517 S.W.2d 210 (1974).
- 6 Ariz.—In re Sears' Estate, 54 Ariz. 52, 91 P.2d 874 (1939).
- 7 Ariz.—In re Sears' Estate, 54 Ariz. 52, 91 P.2d 874 (1939).
- 8 Idaho—Ficarro v. McCoy, 126 Idaho 122, 879 P.2d 30 (Ct. App. 1994).
- 9 Tex.—Miller v. State, 866 S.W.2d 243 (Tex. Crim. App. 1993).
As to definition of special judge, see § 342.
- 10 Ark.—Metal Processing, Inc. v. Plastic & Reconstructive Associates, Ltd., 287 Ark. 100, 697 S.W.2d 87 (1985).
- 11 Ind.—Bostic v. State, 980 N.E.2d 335 (Ind. Ct. App. 2012).
Ohio—Lakewood v. Suleymanov, 160 Ohio Misc. 2d 94, 2010-Ohio-5963, 938 N.E.2d 1126 (Mun. Ct. 2010).

- 12 Tex.—*Lackey v. State*, 322 S.W.3d 863 (Tex. App. Texarkana 2010), petition for discretionary review granted, (Feb. 9, 2011) and judgment aff'd, 364 S.W.3d 837 (Tex. Crim. App. 2012).
- 13 Ind.—*Bostic v. State*, 980 N.E.2d 335 (Ind. Ct. App. 2012).
- Reversible error waived**
Ind.—*Bivins v. State*, 485 N.E.2d 89 (Ind. 1985).
- Objection preserved for appeal**
Tex.—*Sparkman v. State*, 55 S.W.3d 625 (Tex. App. Tyler 2000).
- 14 Ky.—*Jaggers v. Overstreet*, 412 S.W.2d 238 (Ky. 1967).
- Waiver to substitution found**
Md.—*Gibson v. State*, 334 Md. 44, 637 A.2d 1204 (1994).
- 15 Ind.—*Whited v. State*, 645 N.E.2d 1138 (Ind. Ct. App. 1995).
- 16 Md.—*Gibson v. State*, 334 Md. 44, 637 A.2d 1204 (1994).
- 17 Ohio—*Lakewood v. Suleymanov*, 160 Ohio Misc. 2d 94, 2010-Ohio-5963, 938 N.E.2d 1126 (Mun. Ct. 2010).
- 18 Ark.—*Travis v. State*, 328 Ark. 442, 944 S.W.2d 96 (1997).